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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 145.

JAMES B. SWING, AS TRUSTEE FOR THE CREDITORS OF THE UNION MUTUAL FIRE INSURANCE COMPANY OF CINCINNATI, OHIO (FORMERLY A CORPORATION), PLAINTIFF IN ERROR,

vs.

THE WESTON LUMBER COMPANY (A CORPORATION), DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

PATTERSON A. REECE,
VIRGIL I. HIXSON,
Counsel for Plaintiff in Error.

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The Brief for Defendant in Error is confined to endeavoring to maintain that the Record shows that the insurance company (of which Plaintiff in Error is the Trustee for its creditors) "transacted the business within the State of Michigan."

We desire briefly to present for the court's attention what the Record shows on the above point, in addition to what

we have set out in our first brief, and in addition to what appears in the Brief for Defendant in Error.

The testimony of Mr. Marsh (Rec., pp. 8-10) is that he was an employee of the bank. That the Weston Lumber Co. applied to the bank for all the insurance it needed; that Mr. Hill, the president of the bank, was also the superintendent of the Weston Lumber Co., and Mr. Weston, the principal stockholder in the Lumber Co., was also a large stockholder in the bank (Rec., p. 10). The agencies that my bank represented on this lumber were not able to carry the insurance to as large an amount as the Lumber Company wanted to place, so they requested me to secure some other insurance for them. They were familiar with the fact that I could not furnish that amount in the agencies I had in the bank (Rec., p. 10).

The application for this insurance was made to C. H. Spencer & Co., of Minneapolis, Minn., through me; there were 12 policies secured from C. H. Spencer & Co. I did not know Geo. R. Davis & Co. in the transaction (Rec., p. 9).

The finding on this point of the trial court, affirmed by the Supreme Court, is: Defendant made application to the bank for more insurance than it was able to write *"in its own companies"* (Rec., p. 39). The additional insurance desired was placed by Mr. Marsh, an employee of the bank, *"with outside agencies"* (Rec., p. 39).

This policy came through Geo. R. Lewis & Co., of Minneapolis, Minn. (Rec., p. 39).

"Aside from this transaction, there is no evidence that "the said insurance company in any manner solicited or "issued insurance within this State, or did any act in con- "nection with such business which is in violation of the "Statutes of Michigan (Rec., pp. 39 and 40). For the "disposition of this case we may assume that *Marsh acted "as agent of defendant in securing the insurance"* (Rec., p. 41).

"While *this may be held to be an Ohio contract,* nevertheless we cannot escape from the fact that it was a contract to insure within the State of Michigan property of a citizen of the State, and was taking an insurance risk in this State" (Rec., p. 42).

"Regulating the business of insurance, even to the exclusion of foreign insurance companies from taking any risks in the State *under any conditions,* has been held constitutional" (Rec., p. 42).

Then the trial court cites:

Seamans v. Temple, 105 Mich., 401, which is a decision substantially like the decision in the case at bar, excepting that in the Seamans-Temple case the court found that the insurance company had solicited the policy through its agent within the State of Michigan.

On page 42 of the Record, the Supreme Court of Michigan refers to *Seamans v. Temple,* and on page 43 of the Record, quotes therefrom, viz:

"If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this State as though it had been made and was to be performed there.

"It cannot be supposed that the statutes cited were intended *merely to prevent the act of making the contract in* this State. The object is to protect citizens of this State against irresponsible companies, and to prevent insurance by unauthorized companies *upon property in this State.*"

And near the bottom of page 43 of the Record, the court again refers to the Seamans-Temple case and says:

"The contention in this case is the same as in the case above cited. It is true in that case the court found that *within the State* the insurance company had solicited the insurance; but in answer to the arguments there advanced, the court very properly decided the case upon the broader ground. The reasoning in that case is adopted in the case at bar and controls it."

It is plain that the position of both the Circuit and Supreme Courts of Michigan, in the case at bar, is that they considered that the contract of insurance was consummated *outside of the State of Michigan,* and that they regarded the mere fact of issuing the policy on property located in Michigan for residents of Michigan was itself a violation of the statutes of that State and in itself justified the courts of Michigan in refusing to this plaintiff in error the right to maintain an action in that State, notwithstanding that no act was done in that State by any one in any way representing that insurance company.

So it appears in this case that the position taken in Defendant's Brief as to the facts on this, the essential point, is in conflict with the evidence as plainly set forth in the Record, and is also in conflict with the findings of fact of both the Circuit and Supreme Courts of Michigan.

And that the position taken by the Supreme Court of Michigan in this case, as to the law, is in direct and plain conflict with decisions of this court, and with the decisions of the Supreme Courts of nearly all of the States, including two previous decisions of the Supreme Court of Michigan.

And that in this case that court plainly erred so as to violate Sec. 1 of the 14th Amendment of our Federal Constitution, in depriving this plaintiff in error of property without due process of law, and in denying to him the equal protection of the laws.

And that the decision of that court should be reversed.

Respectfully submitted,

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